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In the Supreme Court
of the United States

MITCHELL BROS. TRUCK LINES,
a corporation,

Appellant,

v.

UNITED STATES OF AMERICA, and
INTERSTATE COMMERCE COMMISSION,

Appellees.

On Appeal from the United States District Court for the District of Oregon

BRIEF OPPOSING MOTION TO AFFIRM

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Comes now Appellant ("Mitchell") in opposition to motion to affirm the judgment of the court below.

As to the Certificate's Plain Language

In their motion to affirm Appellees do not precisely state either the contention of Mitchell nor the interpretation which the Commission placed upon the commodity description:

> "*Building materials and heavy machinery*, including heavy steel girders, steel pipe, boilers, water works supplies and plumbing goods, cement, cast stone, wooden pipe and tanks (set up or

knocked down), and fabricated steel reinforcing bars, and other commodities of similar nature."

The clear error of the Commission was in refusing to give any effect whatsoever to all of the 36 words following the description heading, including the nine listed examples in arriving at what the Commission intended in 1939 when it used the terms *Building materials and heavy machinery*. The error was not in finding that the last words "and other commodities of similar nature" referred only to the nine examples listed; a construction not opposed by Mitchell.

Furthermore, Mitchell's contention is that it should be permitted to transport nothing more nor less than that which the above description authorizes. However, that which is neither more nor less includes *building materials and heavy machinery* as broadly illustrated by the nine examples listed and "other commodities of similar nature" to those nine listed examples. It is not *building materials* conditioned upon being intended at time of transportation for use in the construction of a building as distinguished from some other structure, nor is it *heavy machinery* exclusive of the nine examples listed and "other commodities of similar nature. This must be so as to *building materials* because the water works supplies which come within the ambit of building materials are never used in a building as such but rather in the construction of a water system. As to *heavy machinery*, the description expressly includes a boiler. As previously pointed out, the Commission no longer considers a boiler to be heavy machinery. To hold that the Commission's 1963 restrictive view precludes

Mitchell from transporting boilers when its certificate states otherwise would be to take Mitchell's property without due process of law. If Mitchell has authority to transport a boiler, it would certainly follow that it has authority to transport heavy electric transformers and regulators which are unquestionably similar to boilers.

How the Commission came about to emasculate Mitchell's certificate is historically apparent. From the beginning the Commission in issuing certificates has always described commodities in three principal ways: (1) by specifically naming them; (2) by describing them in generic or class terms; and (3) by reference to their intended future use. *C. & H. Transportation Co., Inc. Interpretation of Certificate* (1954), 62 M.C.C. 586, 587. Obviously, a description in generic or class terms cannot at the same time be one in terms of intended future use. In 1939, when issuing the certificate now held by Mitchell, the Commission unmistakeably used *Building materials and heavy machinery* to describe the authorized commodities in generic or class terms.

Now, some 23 years later, the Commission has attached an intended use restriction to the commodity description of "*Building materials* and is bent upon applying it as a so-called "test" to all carriers authorized to transport building materials. At least one District Court has sanctioned such test where the sole words *Building materials* were employed in the description, *Ace Lines, Inc* v. *United States* (1960), 197 F. Supp. 591. However, in the case at bar, the Commission for the first time has met up with not only one of its earlier certificates containing a generic or class term commod-

ity description, but also one having amplifying language which adjectively defines in broad terms exactly what was intended. Shall present Commission policy or words of an earlier certificate control? Therein is the controversy which presents in this case a very substantial constitutional question.

Upon motion to affirm Appellees seek to minimize the substantiality of the federal question by asserting that this case merely involves the Commission's interpretation of a certificate made in the "light of well settled principles". Not once have Appellees either asserted that the Commission gave effect to the 36 amplifying words of the description or explained why it was not required to do so. In the past the Commission has persistently insisted that commodity descriptions in certificates of public convenience and necessity must be read as a whole and that all language used be given its proper meaning, *Whitehouse Trucking* v. *Pre-Fab Transit* (1957) 71 M.C.C. 155, 157. Had the Commission only construed Mitchell's certificate in the light of its own well settled principle it would not have made its clearly erroneous order of September 27, 1962.

As to the "Some Notice" Test

Appellees pass off this most serious constitutional contention of Mitchell by saying it is neither unreasonable nor unusual to require Mitchell to take notice of the possibility of an unlawful intended use of a shipment of building materials by evaluating the type of consignee as shown by a name on a freight bill and decide at peril of certificate revocation whether the con-

signee is one who normally uses or deals in building materials. Mitchell contends such rule is not only unusual and unreasonable but that it invades its constitutional right to have an order, if at all, setting forth a definite standard upon which to determine what conduct shall be innocent or criminal. Here, the Commission's order not only attempts to equate "some notice" with "knowledge" but, of more significance, requires Mitchell to draw inferences from a proper name of a consignee on a freight bill when such inferences can only fly in all directions. The observation of Mr. Justice Douglas in *United States* v. *Cardiff* (1952), 344 U.S. 174 at 176 fits like a glove:

> "Words which are vague and fluid (*United States* v. *Cohen Grocery Co.*, 255 U.S. 81) may be as much of a trap for the innocent as the ancient laws of Caligula."

As to the "Repair" Test

Neither the court below nor Appellees in their motion to affirm touch upon the restriction which the Commission has read into the commodity description of *construction materials* to the effect that Mitchell may transport such materials if it should determine its intended use is to be in the "construction" of something but not if its intended use is to be in the "repair" of something. For the Commission to find from the words *Construction materials* such a connotation is not interpretation, but perversion. There is no reasonable relationship between this non-sensical restriction and motor carrier regulation. Yet, it is no passing fancy. This restriction is becoming Commission precedent, *Freeport*

Transport, Inc., Ext. —Ports of Entry, MC-113666, Sub 10 (Oct. 22, 1963).

CONCLUSION

This case presents three substantial issues involving due process of law as guaranteed by the Fifth Amendment to the United States Constitution. The judgment of the court below should be reversed; not affirmed.

Rsepectfully submitted,

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